SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 64

O. C. TOMKINS,

Petitioner,

vs.

THE STATE OF MISSOURI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

This is a writ of certiorari to the Supreme Court of the State of Missouri, which denied petitioner's petition for writ of habeas corpus on the ground that it failed to state a cause of action.

Petitioner was found guilty of murder in the first degree by the Circuit Court of Pemiscot County, Missouri, and was sentenced to imprisonment in the State Penitentiary for the period of his natural life, on March 19, 1934 (R. 3).

In March, 1944, he filed in the Supreme Court of Missouri his petition for writ of habeas corpus (R. 2), alleging that in the proceedings in the Circuit Court of Pemiscot County, Missouri, he was denied the assistance of counsel, in violation of the Fourteenth Amendment. This petition was accompanied by a motion for leave to sue in forma pauperis (R. 1).

On April 3, 1944, the Supreme Court of Missouri sustained the motion for leave to file the petition for writ of habeas corpus as a poor person, but made no appointment of counsel. By the same order the court denied the petition for habeas corpus on the ground that it failed to state a cause of action (R. 11).

Petitioner then attempted to file a motion for rehearing, repeating that his conviction and sentence were void by reason of the Fourteenth Amendment and claiming also that the Supreme Court of Missouri's denial of his petition for habeas corpus was contrary to the Fourteenth Amendment (R. 7). The Clerk, on April 17, 1944, returned this motion, stating that the court had denied the filing thereof (R. 9).

Petitioner filed his petition for certiorari in this Court on April 24, 1944, accompanying this by a motion for leave to proceed herein in forma pauperis (R. 10). On May 29, 1944, this Court granted the motion for leave to proceed in forma pauperis (R. 9) and on June 12, 1944, it granted petition for writ of certiorari to the Supreme Court of Missouri (R. 10). On October 9, 1944, it appointed counsel for the petitioner.

It has been agreed with counsel for respondent that the Court may be informed that the petition for habeas corpus, the brief filed with it (R. 5), the motion for leave to sue in forma pauperis and the motion for rehearing, filed in the Supreme Court of Missouri, as well as the petition for cer-

tiorari filed in this Court, were not drawn by counsel, nor by the petitioner himself, but were drawn by a fellow-prisoner in the Penitentiary.

Opinion Below

The Supreme Court of Missouri rendered no opinion upon the petition for habeas corpus, its order (R. 11) simply reciting that the same "is hereby denied for the reason that said petition fails to state a cause of action."

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. C., Section 344), providing for the review by the Supreme Court by certiorari of a final judgment or decree of the highest court of a state, in any cause where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

Questions Presented

The questions presented by this writ of certiorari are whether the petition for writ of habeas corpus stated a cause of action based upon the denial of a title, right, privilege or immunity guaranteed to petitioner by the Constitution of the United States, and whether the Supreme Court of Missouri should have denied this petition without consideration on the merits.

Statement

The petition for habeas corpus was denied by the Supreme Court of Missouri, without requiring the State to answer and without giving petitioner an opportunity to prove his allegations, the court holding that the petition failed to state a cause of action. The petition must, under

these circumstances, be given the construction most favorable to petitioner, and every fair inference, every reasonable intendment, must be read into it. This statement is made in the light of that rule.

Petitioner was found guilty of murder in the first degree (a capital offense under the laws of Missouri) by the Circuit Court of Pemiscot County, Missouri, and was sentenced to imprisonment in the State Penitentiary for the term of his natural life on March 19, 1934 (R. 3-5). At no time prior to his conviction was petitioner allowed to consult an attorney (R. 5). In the proceedings in the Circuit Court of Pemiscot County petitioner was not represented by counsel, the court did not make an effective appointment of counsel, and petitioner did not waive his constitutional right to the aid of counsel (R. 2). Petitioner was at that time ignorant of his right to demand counsel in his behalf and was incapable adequately of making his own defense. He pleaded guilty (R. 2). In March, 1944, while he was still confined in the State Penitentiary under the judgment and sentence mentioned above (R. 2), he filed his motion for leave to sue in forma pauperis and his petition for right of habeas corpus in the Supreme Court of Missouri (R. 1, 2). He was then a pauper, without funds, property or income, and unable to pay the cost and expenses of maintaining a habeas corpus action or to employ competent counsel in his behalf (R. 1).

The above recitals appear expressly in the record of the Supreme Court of Missouri. The fair inferences and the reasonable intendments to be drawn from them, and from facts which the Supreme Court of Missouri and this Court must judicially notice, are the following:

That petitioner was not informed of his right to counsel by the trial court.

That petitioner would have requested the assistance of counsel if he had known that he was entitled to it.

That petitioner, if he was ignorant of his constitutional right to counsel, must certainly have been ignorant of the elements required under the laws of Missouri to constitute the crime of murder in the first degree, and of the complex and intricate distinctions between murder in the first degree, on the one hand, and, on the other, murder in the second degree, manslaughter, justifiable homicide, excusable homicide and such defenses to murder in the first degree as insanity, the right of self-defense, and the right of imperfect self-defense, as defined in the statutes of Missouri and elaborated by the decisions of its courts.

That petitioner was unable to form an intelligent judgment, without such knowledge and without legal advice, of whether or not he was guilty of murder in the first degree at the time he made his plea.

That petitioner would not have pleaded guilty to murder in the first degree if he had had the advice of counsel.

That prosecuting attorneys are sometimes overly zealous to obtain convictions.

That petitioner, having been denied the assistance of counsel, may have been induced to plead guilty by considerations unrelated to the merits and not disclosed by this scanty record.

That petitioner having been confined in the State Penitentiary ever since, and being without funds to obtain legal advice, may well have only now discovered his right to the assistance of counsel.

Specification of Errors

The Supreme Court of Missouri erred:

(1) In holding that the petition failed to state a cause of action based upon the due process clause of the Fourteenth Amendment.

(2) In failing to appoint counsel for petitioner, when it granted his petition for leave to sue as a poor person.

(3) In denying the petition for habeas corpus summarily, by the same order which permitted it to be filed.

ARGUMENT

Point I

The petition stated a cause of action based upon the denial of the assistance of counsel, which, in the circumstances here, was guaranteed by the due process clause of the Fourteenth Amendment.

In *Powell* v. *Alabama*, 287 U. S. 45, 71 (1932), the Court said:

> "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law • • •."

The passage was quoted, apparently with approval, but certainly without any impairment of its validity, in *Betts* v. *Brady*, 316 U. S. 455, 463-464 (1942).

This petitioner's cause of action meets all of the conditions of that holding.

1. This was a capital offense

Murder in the first degree ~~by means of a dangerous and deadly weapon~~ is a capital offense. The petition so alleged and the statute so provides. R. S. Mo. 1939, Sec. 4378:

> "Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years."

2. Petitioner was unable to employ counsel to present his defense

The record shows that petitioner was at no time prior to his conviction allowed to consult with an attorney, and that upon his trial he was not represented by counsel. It may fairly be inferred that the petitioner was unable to employ counsel to present his defense, either (a) because he was without funds or (b) because he was deprived of the opportunity.

3. Petitioner was incapable adequately of making his own defense

The petition for habeas corpus alleges that the petitioner was incapable adequately of making his own defense. This is general, not particular. But the court below, in determining whether or not the petition stated a cause of action, should have construed it in connection with the other allegations of the petition—in particular, with the allegation that the petitioner was ignorant of his right to the aid of counsel, and his plea of guilty.

The petition must, of course, also be construed in the light of the laws of Missouri, of the relevant decisions of the Supreme Court of Missouri, and of matters which that Court must judicially notice, which may tend to demonstrate the petitioner's incapacity to perform the formidable task of making his own defense.

Section 4376, R. S. Mo. 1939, defines murder in the first degree as follows:

> "Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree."

This statutory language would present difficulties even to the layman of good intelligence and education, because "willful," "deliberate," and "premeditated" obviously require definition, leaving, as they do, great latitude for hair-splitting distinctions; and because arson, rape, robbery, burglary, and mayhem are all possessed of technical statutory and case-law definitions, some of them most intricate.

But the difficulties confronting a layman in construing this statute and applying it to his own case are small compared to the difficulties which he would have in acquiring an understanding of the numerous technical distinctions which the Supreme Court of Missouri has developed in its construction of the statute. The annotations under Section 4376, R. S. Mo. 1939, disclose nearly 200 decisions of that court dealing with the elements of murder in the first degree, the technical requirements for the indictment or information, the evidence required for conviction, the in-

structions defining the elements of the crime, and the various defenses which may be made.

The complexity of these decisions, and their number, have been affected by the fact that, under the Missouri law, a defendant charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter.[1] He may be acquitted not simply because he did not do the act complained of, but because of the right of self-defense, or because of insanity (Section 4049, R. S. Mo. 1939), or because it may appear to the jury that the "homicide was committed under circumstances or in any case where, by any statute or the common law, such homicide was justifiable or excusable" (Section 4381, R. S. Mo. 1939). Sections 4379 and 4380 define justifiable homicide and excusable homicide at length, and have themselves been the subject of frequent consideration by the Supreme Court of Missouri. There must also be mentioned the so called right of "imperfect self-defense," (available to one who has been attacked and voluntarily returns to the place of conflict, or follows the attacker, without felonious intent) which reduces the offense to manslaughter. See *State* v. *Ferguson*, 182 S. W. (2d) 38 (1944), and *State* v. *Graves*, 182 S. W. (2d) 46, 56 (1944)—not yet officially reported.

The punishment for murder in the first degree must be either death or life imprisonment (Section 4378); but that for murder in the second degree is imprisonment in the Penitentiary for not less than ten years (Section 4378),

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[1] R. S. Mo. 1939, Sec. 4373, quoted above, and Sec. 4844, reading: "Upon indictment for any offense consisting of different degrees, as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such offense, or any degree thereof; and any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher degree of homicide."

while the punishment for manslaughter may be either imprisonment in the Penitentiary for not less than two nor more than ten years, or imprisonment in the county jail for not less than six months, or a fine of not less than $500.00, or both a fine of not less than $100.00 and imprisonment in the county jail for not less than three months (Section 4391).

Construing all of these statutes (with their vast differences in the result to the defendant) the Supreme Court of Missouri has held, for example, that a wilful killing, with malice aforethought and premeditation, but without deliberation, is second degree murder, but if without both deliberation and malice aforethought, it is manslaughter. *State* v. *Burrell*, 298 Mo. 672, 252 S. W. 709 (1923), following the earlier cases of *State* v. *Curtis*, 70 Mo. 594 (1879), and *State* v. *Cosley*, 255 Mo. 185, 164 S. W. 193 (1914). This settled construction of the statute has operated often to save persons charged with murder in the first degree from death or life imprisonment, and to give them an infinitely lesser punishment. It is suggested that this petitioner, who was ignorant even of his right to counsel, would not have known of this rule of construction, would have been incapable of understanding it if it had been read to him, and would have been incapable, if he had understood it, of applying it to the circumstances of his own case.

The Supreme Court of Missouri has likewise held that the law presumes a killing to be murder in the second degree, in the absence of circumstances which tend to raise it to first degree, or to reduce it to manslaughter. *State* v. *Henke*, 313 Mo. 615, 285 S. W. 392 (1926). It is suggested that this petitioner could not have known this; and, if he had known it, was incapable of applying it in his own defense.

These examples of defenses available to the petitioner—if he had had the aid of competent counsel—might be mul-

tiplied many times, as a glance at the annotations in the Revised Statutes (which are by no means complete) indicates. The essential elements of the crime of murder in the first degree are, indeed, so involved and complex that even trial judges, skilled and experienced in the law and aided by counsel for both sides, have been unable to determine what they are in a particular case. In the following relatively recent cases the Supreme Court of Missouri has reversed convictions for murder in the first degree because the trial Court did not instruct on a lesser offense, when the evidence justified such an instruction:

State v. *Jackson*, 344 Mo. 1055, 130 S. W. (2d) 595 (1939) held that defendant was entitled to an instruction on second degree murder.

State v. *Wright*, 337 Mo. 441, 85 S. W. (2d) 7 (1935) held that defendant was entitled to an instruction on second degree murder.

State v. *Creighton*, 330 Mo. 1176, 52 S. W. (2d) 556, (1932) held that the defendant was entitled to an instruction on manslaughter.

State v. *Lashley*, 318 Mo. 568, 300 S. W. 732 (1927) held that defendant was entitled to an instruction on second degree murder.

State v. *Warren*, 326 Mo. 843, 33 S. W. (2d) 125 (1930) held, on a second appeal, that the trial court had erred in its instruction defining deliberation.

State v. *Williams*, not officially reported, 274 S. W. 50 (1925) held that defendant was entitled to instructions on manslaughter and on second degree murder.

State v. *Jordan*, 306 Mo. 3, 268 S. W. 64 (1924) held that defendant was entitled to an instruction upon second degree murder. This decision admirably illustrates the complexity and intricacy of the elements required for murder in the first degree.

Even if the petitioner had been a man of good education and intelligence, and had also been experienced in court procedure, it is submitted that he would hardly have been capable adequately of making his own defense to a charge of murder in the first degree under the applicable Missouri statutes and decisions. But petitioner was not a man of good education and experience; he was ignorant even of his right to counsel. To such a defendant, the requirements for murder in the first degree—"willful," "deliberate" and "premeditated"—the numerous defenses thereto—the technical requirements for arson, rape, robbery, burglary or mayhem—the involved definitions of justifiable homicide and of excusable homicide—the technical refinements of the right of self-defense and of the right of "imperfect self-defense"—the distinctions between murder in the first degree, murder in the second degree and manslaughter—all these were not simply unknown; they were beyond the possibility of comprehension. This prisoner, without counsel, bewildered, on trial for his life, was incapable of defending himself adequately.

4. None of the factors on which the court relied to distinguish Betts v. Brady from Powell v. Alabama is present in this case.

In *Powell v. Alabama*, 287 U. S. 45 (1932), this Court decided that, in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

In *Betts* v. *Brady*, 316 U. S. 455 (1942), the Court (at 463-464) quoted this passage as the precise holding of *Powell* v. *Alabama*, with apparent approval, and distin-

guished the case it was then considering from the earlier decision. There was no suggestion that that narrow and carefully limited holding was to be overruled or in any way weakened by the later decision. It is submitted that the petition for habeas corpus here, when read as it must be read, states a case which comes within that rule.

None of the factors on which the Court relied to distinguish *Betts* v. *Brady* from *Powell* v. *Alabama* are present in this case. *Betts* v. *Brady* was not a capital case; this is. In *Betts* v. *Brady* it affirmatively appeared that the petitioner's sole defense was an alibi and that "the simple issue was the veracity of the testimony for the State and that for the defendant." That was by no means the simple issue here. In *Betts* v. *Brady* "there was no question of the commission of a robbery." Here there obviously was a grave and difficult question of the commission of murder in the first degree. In *Betts* v. *Brady* it affirmatively appeared that the accused "was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue," and that he "was not wholly unfamiliar with criminal procedure." Here the petitioner was ignorant even of his right to the assistance of counsel, and there is nothing in the record to indicate either his age or that he had had any experience with criminal procedure. There is nothing here to negative the possibilities that he was not only ignorant, but helpless, bewildered, friendless and intimidated. It is to be noted that he pleaded guilty to murder in the first degree, when he could hardly have known that he was guilty of that crime.

5. THE MISSOURI STATUTE REQUIRED APPOINTMENT OF COUNSEL IN THIS CASE

Finally, in *Betts* v. *Brady*, the Court distinguished that case from *Powell* v. *Alabama* by the fact that in the later

case no statute of Maryland required the appointment of counsel, whereas in the earlier case an Alabama statute did require it. Referring to *Powell* v. *Alabama*, the Court said:

> "This occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offense charged. Thus the trial was conducted in disregard of every principle of fairness and in disregard of that which was declared by the law of the State a requisite of a fair trial."

The difference in the legislative policy of the two States was relied upon as a ground, and indeed as one of the principal grounds, for distinguishing them. But the petition here must be considered in the light of Section 4003, R. S. Mo. 1939, reading as follows:

> "If any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."

This statute has remained in force unchanged since 1835 (R. S. Mo. 1835, p. 485, Sec. 3), when an earlier statute (Rev. Laws of Missouri, 1825, p. 319, Sec. 22), which had been limited to capital cases, was extended to all felonies. The legislative policy of Missouri is thus identical with that of Alabama in requiring the appointment of counsel in capital cases. It has been so almost from the admission of the State to the Union, one hundred and twenty-four years ago.

The petition for habeas corpus here states a failure to comply with this statute. The prosecution here was upon an information, whereas the statute uses the language "arraigned upon an indictment," enacted when informations were not permitted. But the Supreme Court of Missouri

has applied it to prosecutions upon informations, without question.

State v. *Steelman*, 318 Mo. 628, 300 S. W. 743 (1927); *State* v. *Terry*, 201 Mo. 697, 100 S. W. 432 (1907).

In both of these cases that court, paraphrasing the language of the statute, remarked that three things were necessary to be found by the trial court before appointing or assigning counsel for a defendant charged with felony: One, that the defendant was without counsel; two, that he was unable to employ counsel; three, that he had requested that counsel be appointed for him. But in both of these cases, unlike the case at bar, the records affirmatively showed that the trial court had found that defendant was able to employ counsel, making it quite clear that the matter of appointment was discussed and that the defendant did not fail to request counsel because of ignorance of his right. Other Missouri decisions have since made it clear that the three conditions need not all be spelled out in the record, but may be inferred.

Thus, in *State* v. *Williams*, 320 Mo. 296, 6 S. W. (2d) 915 (1928), a prosecution for rape, the Supreme Court of Missouri said that when the defendant requests the court to appoint counsel for him it will be presumed (1) that he was without counsel, and (2) that he lacked funds to employ counsel.

In *State* v. *Hamilton*, 337 Mo. 460, 468, 85 S. W. (2d) 35 (1935), a prosecution for murder in the first degree, where defendants pleaded guilty, the Supreme Court of Missouri referred approvingly to the action of a trial court which made "repeated suggestions, amounting, in fact, to an insistence," and "repeated requests" that defendants permit the appointment of counsel. There the defendants not only did not request counsel, but were obdurate in their refusal to accept counsel.

A very similar case is *State* v. *Moore*, 121 Mo. 514, 26 S. W. 345 (1894), a prosecution for burglary in the first degree, where "the court offered and insisted upon assigning counsel for defendant," but defendant "refused to permit it to be done or to accept the services of an attorney thus assigned." The Supreme Court of Missouri approved the conduct of the trial judge.

It would seem from these decisions that the Missouri Supreme Court has not regarded a request for counsel as a necessary prerequisite to the statutory right to appointment of counsel. Certainly that court has never held that the trial court has complied with Section 4003 when the court fails to inform a defendant on trial for his life, without counsel, and ignorant of his right to have counsel assigned to him, that that right exists. If the statute were construed to permit that, its purpose would be defeated, for it would have no effect whatever in the cases where it was most needed. The educated defendant and the experienced criminal would make the request; the ignorant first-time offender, who is least able to defend himself adequately, would lose the whole right. This Court has been realistic in recognizing that "the purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and that the guaranty would be nullified by the determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938). That case dealt with the right to counsel in a Federal prosecution, but it applies with at least equal force to the situation of an ignorant accused on trial for murder in the first degree under the Missouri law.

Certainly the Missouri courts have never held that the failure to make the request, through ignorance of the right,

is a waiver of Section 4003. No case has been found where the trial court, trying a defendant charged with felony, who appears without counsel, did not apprise him of his statutory right to counsel. It is to be noted that the holding in *Powell v. Alabama* (quoted in *Betts* v. *Brady*) included the statement that it was the duty of the court to appoint counsel "whether requested or not." Here, as in *Powell* v. *Alabama*, this Court is powerless to interfere with the interpretation of State statutes by the State court; but here, as there, this Court may take into account the legislative policy of the State in determining whether the conviction violated the due process clause of the Fourteenth Amendment. Here, as in *Powell* v. *Alabama*, the denial of counsel occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offense charged.

It is submitted that none of the factors by means of which *Betts* v. *Brady* was distinguished from *Powell* v. *Alabama* exist in this case. It is submitted that, under what is now a settled rule of due process, the petition for habeas corpus, with the fair inferences and reasonable intendments which must be read into it, stated a cause of action. It is submitted that that petition should not have been summarily dismissed, without the inquiry into the facts which would have resulted from the issuance of a writ, and without the appointment of counsel, who might, in his traverse of the return, have been able to state the facts with regard to this petitioner's conviction more strongly and more fully than was done in the petition drawn within the four walls of a penitentiary.

Betts v. *Brady*, 316 U. S. 455 (1942);
Smith v. *O'Grady*, 312 U. S. 329 (1941);
Avery v. *Alabama*, 308 U. S. 444 (1940);
Powell v. *Alabama*, 287 U. S. 45 (1932).

6. PETITIONER'S PLEA OF GUILTY, UNDER THE CIRCUMSTANCES HERE, SIMPLY EMPHASIZES HIS NEED OF COUNSEL

The petitioner, without counsel, pleaded guilty to the charge of murder in the first degree and received life imprisonment. It is submitted that he could not possibly have known whether, under the laws of Missouri, he was guilty of that capital offense, perhaps the gravest and most serious known to the law. The plea demonstrates that while, as this Court said in *Powell* v. *Alabama*, an ignorant defendant on trial for a capital crime "requires the guiding hand of counsel at every step in the proceedings against him," the need for counsel is nowhere greater than in connection with the accused's plea. For by pleading guilty he shuts himself off from every possibility of establishing his innocence; he permits himself to be condemned irrevocably without a hearing; he forever shuts out any possibility that he may receive a fair trial of the issues.

The petitioner here could not have known that he was guilty of murder in the first degree, when he so pleaded, and he cannot know it now. Assuming even that the petitioner knew that he had committed homicide, he could not know whether that was murder in the first degree, murder in the second degree, manslaughter, excusable homicide, or justifiable homicide. He could not know, when he pleaded guilty, whether or not he was insane at the time the act was done. It was literally impossible for him to know whether he was guilty or not guilty, without the assistance of counsel.

And even if the petitioner were guilty of murder in the first degree, that could have no influence in the proceedings here, for it is not the question which must be decided. His right to counsel must be determined as of a time anterior to his plea. It must be determined not only as of that time, but in the light of the fact that he was pre-

sumed to be innocent. And the question before this Court, as it was before the Supreme Court of Missouri, is not whether the failure to appoint counsel did petitioner any harm, but whether he has been deprived of a right guaranteed to him by the due process clause, so as to render his plea of guilty and all subsequent proceedings void. In *Glasser* v. *United States*, 315 U. S. 60, 75-76 (1942), the Court said:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 136-137 (1934), Mr. Justice Roberts, dissenting, said:

> "The respondent urges that whatever may have been the petitioner's right, the record demonstrates he could have suffered no harm by reason of his absence • • • But if it were clear that the verdict was not affected by knowledge gained on the view or that the result would have been the same had the appellant been present, still the denial of his constitutional right ought not be condoned. Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question of the amount of harm done the accused, is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him."

And he added (at 137):

> "• • • where the conduct of a trial is involved, the guaranty of the Fourteenth Amendment is not

that a just result shall have been obtained, but that the result, whatever it may be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard of those rules, and is not satisfied, if, though the hearing was unfair, the result is just."

Even when a jury has convicted, after a fair trial in which the accused has had the aid of counsel, the accused is still in need of counsel when the court considers the degree of punishment to be assessed. The circumstances which ought to be brought to the attenion of the court before sentence, and which may induce a light sentence instead of a heavy one, require the aid of counsel for their adequate presentation. In this case that might have been particularly important because, under his indictment, petitioner's punishment might have ranged anywhere from a fine of one hundred dollars and imprisonment in the county jail for a term of three months (if he received the minimum punishment for manslaughter) to death (if he received the maximum punishment for murder).

In *Smith* v. *O'Grady*, 312 U. S. 329 (1941), the petitioner, an ignorant layman without counsel, supposing that he was charged with simple burglary, pleaded guilty pursuant to pre-arrangement and an agreement with the prosecuting attorney for a sentence of not over three years. Upon making the pre-arranged plea, he was sentenced to twenty years' imprisonment. He then asked to withdraw his plea, and requested the appointment of counsel. These requests were denied, and he proceeded to the penitentiary as promptly as did the petitioner in the case at bar. The case was heard upon a habeas corpus petition filed after eight years in the Penitentiary. The Nebraska court had dis-

missed the petition, holding that it failed to state a cause of action. Upon this record, this Court said (at 334):

> "These allegations, if true, undermine and invalidate the judgment upon which petitioner's imprisonment rests. The circumstances under which petitioner asserts he was entrapped and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty. The petitioner charged that he had been denied any real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process; that because of deception by the state's representatives he had pleaded guilty to a charge punishable by twenty years to life imprisonment; that his request for the benefit and advice of counsel had been denied by the court; and that he had been rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal. If these things happened, petitioner is imprisoned under a judgment invalid because obtained in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment. The state court erroneously decided that the petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand."

The case at bar, in spite of a much scantier record, presents many points of resemblance to *Smith* v. *O'Grady*. Some resemblances are to be found in the allegations of the petition, others in the fair inferences which may be drawn from these allegations. These resemblances would perhaps be increased if the Supreme Court of Missouri

had, as it was requested to do, appointed counsel and issued its writ. The record would then consist of the return and petitioner's traverse. If the court had then accorded petitioner a hearing, the evidence might disclose a conviction here under circumstances quite as shocking to the universal sense of justice, as those in *Smith* v. *O'Grady*.

In *Walker* v. *Johnston*, 312 U. S. 275 (1941), an accused without counsel entered a plea of guilty and was sentenced to twelve years' imprisonment. Upon his petition for habeas corpus, the return, and the traverse, it was held that he was entitled to a hearing. This Court said (at 286) that if the facts alleged by the petitioner were established by evidence,

> "they would support a conclusion that the petitioner desired the aid of counsel, and so informed the District Attorney, was ignorant of his right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course. If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right."

In the case at bar it may fairly be inferred that petitioner, having been denied the assistance of counsel, may have been induced to plead guilty because of considerations unrelated to his guilt or innocence, and not disclosed by the record. Even in Missouri, where a determined effort has been made and is still being made to improve the administration of justice, it has been recognized that prosecuting attorneys are sometimes overly zealous to obtain convictions. In an article by Mr. Earl T. Crawford of the Mis-

souri Bar, published in the Missouri Bar Journal in 1934 (the year of this petitioner's conviction) it was observed:

> "As much as the criminal procedure of our state needs reformation, it alone is not responsible for many of the short-comings of our present system of criminal jurisprudence from the procedural and administrative standpoints * * *
>
> "As I have already hinted, the prosecuting attorney is to blame for much of the criticism of the present system. Too often, he possesses the wrong attitude, as is best described in the words of Samuel Untermeyer:
>
> > 'The modern prosecuting attorney does not stand between the people and the accused. He and his assistants too often measure the success of their labors by the number of convictions they have secured. It is a false and brutal conception of duty that is responsible for grave injustice, but it is none the less true that it exists. Under its influence, the prosecuting attorney becomes a partisan advocate, blind to the strength of the defense, unwilling to voluntarily expose the weakness of the people's case.'
>
> The validity of this assertion appears, I am sure, to the lawyer accustomed to appear for the defense, or to the prosecuting attorney who will meet the issue frankly. Untermeyer's charge, of course, will not apply to the conduct of every prosecuting attorney in the trial of every case, nor to every prosecuting attorney, for undoubtedly here are some who are not blind partisan advocates measuring their success by the number of convictions obtained.
>
> "Neither are the attorneys for the defense without blame; but the attitude of the state, through its attorney, in seeking a conviction regardless of the facts and by any means, has created much of the same kind of attitude on the part of the defense in seeking an acquittal. The position of the prosecuting attorney is a strategic and important one in the judicial system of every community, for many reasons. As the repre-

sentative of the state, he is regarded by many jurors as the source of justice and one whose word is the law. Usually because of this factor, the defense works at a disadvantage.

"Under such circumstances, where the prosecuting attorney is seeking to add another feather to his cap or to make an example of some offender, a poor or ignorant person, particularly where weakly defended by an incompetent attorney, may be and often is heavily dealt with regardless of his offense. The safeguards of our criminal procedure were originally designed to protect the lowly against the great power of a royal government. And it would seem that such safe-guards are as necessary today as ever; perhaps more so in order to protect our people from the ever increasing power of the state, especially so long as the attorneys for the state seek convictions for their own personal advancement and assume the position of a partisan advocate instead of simply standing 'between the people and the accused.' The incorporation into our criminal jurisprudence of a public defender would tend to obviate the 'all-mighty' position now occupied by the prosecuting attorney in the minds of many." Crawford, The Prosecuting Attorney's Attitude, 5 Mo. Bar Journal 138 (1934).

It is submitted that the plea of guilty here has these effects, and no others: It emphasizes (1) petitioner's need for counsel before he made his plea, and (2) that the denial of counsel may have been highly prejudicial.

Point II

The right of the accused in a criminal prosecution to have the Assistance of Counsel for his defense, as guaranteed by the Sixth Amendment, is guaranteed against State abridgment by the due process clause of the Fourteenth Amendment.

It has been urged above that the petition for habeas corpus here stated a cause of action based upon the narrow

holding of *Powell* v. *Alabama*, 287 U. S. 45 (1932); that, under the conditions present there (which conditions, it is contended, were also present here), it was the duty of the court to assign counsel as a necessary requisite of due process of law. *Betts* v. *Brady*, 316 U. S. 455 (1942), did not in the least impair the validity of that holding. The later decision did, however, hold that the right to the appointment of counsel, although within the guaranty of the Sixth Amendment, was not "a right so fundamental and essential to a fair trial, and so, to due process of law," as to make it binding upon the States by the Fourteenth Amendment. It was held that while the failure to appoint counsel might, in a particular case, result in a trial and conviction "offensive to the common and fundamental ideas of fairness and right," the Fourteenth Amendment did not "embody an inexorable command."

Petitioner now urges that *Betts* v. *Brady* was wrongly decided and should be reexamined.

1. Betts v. Brady (316 U. S. 455) should be reexamined

The holding of *Betts* v. *Brady* is supported by no earlier authority. On the contrary, as the Court there said (at 462-463):

> "Expressions in the opinions of this Court lend color to the argument [that the right to counsel as guaranteed by the Sixth Amendment is carried into the due process clause of the Fourteenth], but, as the petitioner admits, none of our decisions squarely adjudicates the questions now presented."

The expressions which lent color to this contention, made in *Betts* v. *Brady* and now renewed, were the following:

(1) In *Powell* v. *Alabama*, 287 U. S. 45 (1932), the Court held that the failure to make an effective appointment of

counsel was a denial of due process, adding (at 71): "Whether this would be so in other criminal prosecutions or under other circumstances, we need not determine." But the Court said that the question was whether the right involved was "of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," that if a right were of such a nature it was included in due process of law, and said (at 73):

> "The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."

The Court limited its holding to the facts of the particular case, out of caution, but its views upon the broader question seemed quite clear.

(2) Four years later, in *Grosjean* v. *American Press Company*, 297 U. S. 233, 243-244 (1936), a unanimous court said that in *Powell* v. *Alabama*:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

This opinion was by Mr. Justice Sutherland, who had written the majority opinion in *Powell* v. *Alabama*.

(3) In *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938), the Court said that the right to the assistance of Counsel was "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." The provision was submitted by the First Congress, as one of "the essential barriers against arbitrary or unjust deprivation of human rights."

It is true that this case dealt with a trial in a Federal court; but the fundamental nature of the need for counsel is at least as great in State courts as Federal.

(4) In *Avery* v. *Alabama*, 308 U. S. 444, 447 (1940), the Court said:

> "Consistently with the preservation of constitutional balance between State and Federal sovereignty, this Court must respect and is reluctant to interfere with the States' determination of local social policy. But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacrediness demands that we scrupulously review the record."

Mr. Benjamin V. Cohen and Professor Erwin N. Griswold, in their criticism of *Betts* v. *Brady*, concluded as follows:

> "Most Americans—lawyers and laymen alike—before the decision in Betts v. Brady, would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our own Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in Betts v. Brady would not wish their decision to be used to discredit the significance of that right and the importance of its observance.
>
> "Yet at a critical period in world history, Betts v. Brady dangerously tilts the scales against the safe-

guarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right of counsel to defend him. The right to counsel, for the poor as well as for the rich, is an indispensable safeguard of freedom and justice under law." Cohen and Griswold, "Denial of Counsel to Indigent Defendants," New York Times, August 2, 1942, IV, 6:5.[2]

This Court has recently said, in *Smith* v. *Allwright*, 321 U. S. 649 (1944):

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself."

The Court ought not to have the least hesitation to apply this rule to a constitutional determination which is supported by only one decision, two years old, which itself interrupted, if not a continuity of decisions, at least a continuous current of thought, to the contrary, expressed by the Court on several occasions.

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[2] For other adverse criticism of *Betts* v. *Brady*, see Lusky, Minority Rights and the Public Interest, 52 Yale L. J. 1, 28-30 (1942); Lashly & Rava, the Supreme Court Dissents, 28 Washington U. L. Q. 191, 204-205 (1943); 21 Chicago-Kent L. Rev. 107 (1942); 42 Col. L. Rev. 1205 (1942); 11 Geo. Wash. L. Rev. 254 (1943); 31 Ill. Bar J. 139 (1942); 27 Marquette L. Rev. 34 (1942); 16 So. Cal. L. Rev. 55 (1934); 91 U. of Pa. L. Rev. 78 (1942); Wisc. L. Rev. 118, 123 (1943); 17 Tulane L. Rev. 306 (1942).

2. THE RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT IS SO FUNDAMENTAL THAT THE DUE PROCESS CLAUSE MUST PROTECT IT AGAINST STATE DENIAL. THIS IS SO BECAUSE OF THE ADVERSARY CHARACTER OF OUR JUDICIAL PROCESS.

In determining whether the right to counsel in a criminal prosecution is of a fundamental character, the nature of our judicial process must be taken into account. If the Anglo-American system of criminal jurisprudence were an investigative system, the right of the accused to counsel would be relatively unimportant. The court would be charged with the affirmative duty of initiating a thorough inquiry to ascertain the facts, regardless of where they might be found or in which direction they might tend, and without dependence on the adequacy of the presentation by the prosecution and the accused of their respective sides.

But the adversary system which emerged from the common law is of a different character. The role of the judge is chiefly that of an impartial and passive referee, leaving to the parties—and the counsel for each—the presentation of the evidence and of the law. The issues must be decided solely on the evidence presented in open court. Neither the judge nor the jury may properly institute an independent inquiry into the matter (See Edmund M. Morgan, The Relation Between Hearsay and Preserved Memory, 40 Harv. L. Rev. 712, 713 (1927). They would be subject to challenge if they did acquire and take into account knowledge of the facts obtained outside the courtroom. The rules of evidence and procedure, technical defects of many kinds, the right to change of venue, challenge of jurors, exclusion of incompetent evidence—all must be promptly claimed by the parties. Error may be committed, irrelevant or hearsay testimony may come in, erroneous instructions may be given. The verdict and judgment will nevertheless

stand if timely objection was not made and an exception preserved. Even then, waiver or acquiescence may be inferred and thus the original objection destroyed.

The theory is that truth can be discovered in this manner. Counsel will expose the weaknesses which may lie concealed in the case for the opposing party. A searching cross-examination may lay bare falsehood and perjury, and disclose defective observation as well as unfounded exaggeration. A perceiving judge and an alert jury will discern the points so brought out and will decide with them in mind. The judge is limited by statute and by decision (more so, as a rule, in State courts than in Federal) from taking an active part in a trial by bringing in new witnesses, by suggesting objections, by commenting upon the credibility of witnesses, or by attempting to discover the real truth in avenues which have not been opened by the parties. See 1 *Wigmore on Evidence* (3rd Edition), sec. 21, 374.

The Supreme Court of Missouri has held that in criminal prosecutions the trial court is simply an umpire and cannot advise a defendant without counsel as to what he ought to do in his own defense. In *State* v. *Miller* (not officially reported), 292 S. W. 440 (1927), a defendant who was able to employ counsel but who failed to do so, undertook to conduct his own defense. On appeal, he claimed that the trial court erred in failing to advise him that he had a right to offer instructions to the jury. The Supreme Court said:

> "That complaint implies that it was the duty of the court, not only to see that the case was fairly tried as it progressed, but to coach the defendant as to what he ought to do in conducting his defense. The defendant was not aware that he was lacking in ability to conduct his defense. The record shows that he managed his case with the utmost assurance. * * * We are unable to see any failure of the court to do its full duty by him."

Under the adversary system, the trial is, therefore, a game in which the players are the litigants. And, as is true in all contests, a very great, and often decisive, advantage rests with the party familiar with the rules of play. The theory of the adversary system—that justice will emerge—must be predicated upon a necessary ingredient of the process: that not one but both parties will have a working knowledge of the rules of play.

When the adversary system operates in the sphere of criminal prosecutions, where a man's life or liberty is at stake, additional factors, which have not infrequently been the subject of comment by this Court, must be considered:

(1) Criminal law is a highly complex field of intricate principles, difficult for the lawyer not experienced in that field and often incomprehensible by even the highly intelligent layman. "The lay vision of every man his own lawyer has been shown by all experience to be an illusion." (Roscoe Pound, *The Administration of Justice in the Modern City*, 26 Harv. L. Rev. 302, 319 (1913).) Based upon extensive studies of crime and criminals, Professor Sheldon Glueck has concluded that the furnishing of defense counsel "to poor persons accused of crime is a crying need." *Crime and Justice* (1936), 241.

(2) Substantial evidence exists to indicate that persons accused of crime are, more often than not, persons of little education, subnormal intelligence, and meager financial resources. See, for example, Glueck, *Crime and Justice* (1936), 193-197; Sheldon and Eleanor Glueck, *Criminal Careers in Retrospect* (1943), 5-6; Dwight McCarty, *Mental Defectives and the Criminal Law*, 14 Iowa L. Rev. 401, 416 (1929); A. Warren Stearns, *Medical and Social Factors in Crime*, 18 Ind. L. J. 283, 288 (1943). They are thus at an increased disadvantage because of their lack of personal ability and of funds with which to employ counsel.

(3) Prosecuting attorneys are often more interested in obtaining convictions than in seeing that exact justice is done. "The need of 'getting results' puts pressure upon prosecutors to use the 'third degree,' to suppress evidence, to bulldoze witnesses, and generally to indulge in that lawless enforcement of law which produces a vicious circle of disrespect for law." Roscoe Pound, *Criminal Justice in America* (1930), 186; see also Glueck, *Crime and Justice* (1936), 35, 65. They have a direct personal interest in obtaining a plea of guilty.

This Court has often commented upon one or more of these factors, which are of frequent and general application to persons accused of crime, in stressing the importance of counsel to a criminal defendant. Deliberate deception may be attempted to be practiced upon a court by the presentation of perjured testimony (cf. *Mooney* v. *Holohan*, 294 U. S. 103). Confessions may be introduced by state officers with knowledge that they have been improperly obtained. (*Brown* v. *Mississippi*, 297 U. S. 278 (1936).) Pleas of guilty may be elicited by misrepresentation. (*Smith* v. *O'Grady*, 312 U. S. 329 (1941).) And, even assuming no improper inducement or other action, the trial may proceed to a conviction with the state, represented by a professionally trained representative, triumphing over an accused who did not realize that he had a right to offer instructions. (*State* v. *Miller*, 292 S. W. 440 (1927).) Under those circumstances, justice, if that result is attained in a given case, must be purely coincidental.

It was in recognition of this obvious truth that this Court stated that an accused required the "guiding hand of counsel at every step in the proceedings against him." (*Powell* v. *Alabama*, 287 U. S. 45, 68 (1932).) There has appeared from the record "a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law en-

forcement officers into entering a plea of guilty * * * rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal." (*Smith* v. *O'Grady*, 312 U. S. 329, 334.) And this Court has recognized that the reason for the guarantee of the right to counsel contained in the Sixth Amendment was to protect an accused from a conviction resulting from his own ignorance. *Johnson* v. *Zerbst*, 304 U. S. 458, 462-463 (1938):

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer—to the untrained layman—may appear intricate, complex and mysterious."

The importance of this has recently been reasserted:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court."
>
> *Adams* v. *United States*, 317 U. S. 269, 279 (1942).

This realistic truth does not become less evident because the trial takes place in a state rather than in a federal court. The laws are not less intricate; the accused is no more edu-

cated or intelligent and possesses no greater legal skill; the prosecuting officer is no less partisan; and the court is no more able, under the governing rules, to conduct the defense for the accused nor to make an independent inquiry to ensure that justice is done.

Scanty records may and probably will not in most instances reveal the prejudice sustained by an accused who appears without counsel. This is particularly true where the defendant is induced to plead guilty, although it may be in this situation that he is particularly in need of such assistance. Under the adversary system, the handicap placed upon the man who has had no training in the rules is evident. Under that system the right of an indigent accused to the appointment of counsel is so fundamental that the due process clause must protect it.

3. THE RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT IS SO FUNDAMENTAL THAT THE DUE PROCESS CLAUSE MUST PROTECT IT AGAINST STATE DENIAL. THIS IS SO BECAUSE WITHOUT IT THE OTHER FUNDAMENTAL RIGHTS OF THE ACCUSED MAY BE LOST.

The rights of the accused in criminal prosecutions, as enumerated in the Bill of Rights, include, in addition to the right to have the Assistance of Counsel, the following rights also guaranteed by the Sixth Amendment:

(1) To a speedy and public trial.

(2) By an impartial jury of the State and district wherein the crime shall have been committed.

(3) To be informed of the nature and cause of the accusation.

(4) To be confronted with the witnesses against him.

(5) To have compulsory process for obtaining witnesses in his favor.

They include also, among other rights, the rights of the Fourth Amendment against unreasonable searches and seizures, the restriction of that Amendment respecting search warrants, the right against double jeopardy set out in the Fifth Amendment, the privilege against self-incrimination also contained there, and the prohibitions of the Eighth Amendment against excessive fines and cruel and unusual punishments.

The Constitutions of the States as a rule contain similar guaranties of most of these rights. It is true that some of the guaranties may be lacking in a particular State Constitution; and it is true also that the extent of the guaranties may vary, not only because of differences in the terms of the constitutional provisions, but also because of the differing constructions placed upon them by the courts. Nevertheless it is true that most if not all of these rights, in one form or another, and to a greater or less extent, are the rights of the accused in every American court.

Some of them appear to be unquestionably essential parts of due process, and thus are still the rights of an accused even when he is on trial in the court of a State where the State Constitution lacks the particular guaranty.

Thus, the right of an accused to be confronted with the witnesses against him appears to be an essential part of due process, protected against State denial. In *Snyder v. Massachusetts*, 291 U. S. 97 (1934) a five-to-four decision, the majority said (at 106) as to this right, that "for present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, although this has not been squarely held". Mr. Justice Roberts, speaking for the minority, said (at 131):

> "In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of

assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."

But of how great value is this right, without counsel?

The rights of an accused to be informed of the nature and cause of the accusation, and to receive a fair hearing before an impartial jury, have, of course, been repeatedly held to be protected by the due process clause against State denial. In *Powell* v. *Alabama* the Court said:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law."

See also:

Twining v. *New Jersey*, 211 U. S. 78, 111 (1908);
Snyder v. *Massachusetts*, 291 U. S. 97, 105, 127 (1934);
Mooney v. *Holohan*, 294 U. S. 103, 112 (1935);
Brown v. *Mississippi*, 297 U. S. 278, 285-286 (1936);
Chambers v. *Florida*, 309 U. S. 227, 236-237 (1940);
Lisenba v. *California*, 314 U. S. 219, 236-237 (1941);
Lyons v. *Oklahoma*, 64 S. Ct., 1208, 1213 (1944).

In the Snyder case the Court said (at 105):

> "What may not be taken away [consistently with due process] is notice of the charge and an adequate opportunity to be heard in defense of it."

But often an accused cannot have an "adequate" opportunity to be heard in his own defense, if he is without counsel. He cannot examine or cross-examine adequately; he does not know the rules. He often does not even know that he is entitled to notice of the charge, and if he receives notice he cannot determine its sufficiency.

In a formidable series of decisions, commencing with *Brown* v. *Mississippi*, 297 U. S. 278 (1936), the latest of which is *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944), this Court has held unequivocally that the use of confessions obtained by torture, by persistent and protracted questioning, by threat of mob violence, by holding the accused incommunicado, or under similar circumstances, is a denial of due process.

It is suggested that in every case the adequate assertion of the rights of the accused with respect to the exclusion of such confessions required counsel. In more than one of these cases the right was asserted by appointed counsel.

There are other rights in the Bill of Rights which are certainly essential elements of due process. In *Powell* v. *Alabama* there was involved, not only the right to appointment of counsel, but the right to have the effective assistance of counsel, when counsel had been provided, which this clause of the Sixth Amendment also guarantees. The Court held that that was certainly included in due process. In *Avery* v. *Alabama*, 308 U. S. 444, 445-446 (1940), the Court said:

> "The sole question presented is whether in violation of the Fourteenth Amendment 'petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial,' because after competent counsel were duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.
>
> "Had petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guaranty of assistance of counsel would have required reversal of his conviction. But counsel were duly appointed for petitioner by the trial court

as required both by Alabama law and the Fourteenth Amendment.

* * * * * * *

"But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. *The Constitution's* guaranty of assistance of counsel cannot be satisfied by mere formal appointment."

Betts v. *Brady* approved the expressions in the two earlier cases, the Court there clearly considering (at 463-464) that deprivation of an adequate opportunity to confer with counsel violated fundamental principles of fairness, and hence violated the due process clause.

To the same effect, see *Ex Parte Hawk*, 321 U. S. 114 (1944).

The situation which *Betts* v. *Brady* has thus created seems shocking to fundamental principles of fairness. If the accused is able to employ counsel, then in every case — no matter how petty the offense nor how light the penalty — he cannot be hurried to trial, and counsel must be given every reasonable opportunity to confer with him and to prepare his defense. But if the accused is without funds with which to employ counsel (unless it is a capital case and he is able to prove later that he was unable to present his defense adequately), then he can be hurried to trial without counsel, without knowledge of his rights, and be on the way to the Penitentiary within the hour. It is suggested that the contrast is "offensive to the common and fundamental ideas of fairness and right."

The right to have the Assistance of Counsel, including the appointment of counsel when the accused is unable to

obtain counsel otherwise, is the key which unlocks the door to all the other rights of an accused. It is the one right without which the others become valueless—because they are either unknown to the accused, or beyond his powers to apply to his case, or sometimes to understand at all. Without counsel an accused may be deprived of all the other rights which are guaranteed him, either by the due process clause or by State constitutional provisions, through ignorance that they exist, through inability to apply them to his case, or even through sheer fear of asserting them against an over-powering and unscrupulous prosecutor. Without counsel, ignorant of his rights, the accused may be induced to plead guilty, and thus make it impossible for due process to operate. This Court's decisions in recent years disclose many instances of the loss or alleged loss of such rights by an accused. In how many of these could the right have been effectively asserted, at the time or thereafter, by an accused without the aid of either employed or appointed counsel? In how many other instances does the accused, still without counsel, remain in the Penitentiary without knowledge of his rights?

In *Powell* v. *Alabama* (at 68-69), in a passage whose authority later decisions have strengthened rather than weakened, the Court said:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial with-

out a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

Quoting this passage with approval, the Court, in *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938), said:

"The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights * * *."

That was a Federal trial, but the expression applies with equal force to fundamental constitutional rights which the due process clause makes binding in State courts.

The Court has recently been divided on the question of whether an accused, who had studied law and had personally handled litigation in the Federal courts, could intelligently waive his right to trial by jury, when, because of his own choice, he was without counsel. *Adams* v. *United States*, 317 U. S. 269 (1943). Yet to choose between trial by jury and trial by a particular judge is infinitely more simple than the adequate assertion and preservation of other rights, by an accused who may be, and often is, ignorant of their existence.

It was suggested in *Betts* v. *Brady* that since the accused there had had what, on the record, appeared to be a fair trial, without counsel, the right to the appointment of counsel could not be a fundamental right, of inexorable application. But the Court has held that if a right is embraced within due process, the fact that deprivation of it has done the accused no harm is of no consequence—he still has not had due process. The inquiry cannot be converted "from one as to the denial of the right into one as to the prejudice suffered by the denial," as Mr. Justice Roberts said in *Snyder* v. *Massachusetts*, 291 U. S. 97, 136 (1934). Of course only some, not all, persons accused of crime require all of their constitutional rights in order to have a fair trial —as to any particular right, many will, on the advice of their counsel, make an intelligent waiver of it. But that does not mean that the right fails to continue as a part of due process, nor that it becomes simply a matter for the trial court's discretion.

As another court once said:

> "would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial, * * * and yet say to him when on trial, that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him * * * Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?"
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> *Carpenter* v. *County of Dane*, 9 Wisc. 249, 251 (1859).

It is submitted that ~~this~~ the right to the assistance of counsel, as guaranteed by the Sixth Amendment, is necessary unless the guaranty to the accused of other rights (many of which this Court has held are fundamental) is to become ineffective in the case of an accused unable to employ counsel.

4. THE RIGHT TO COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT IS SO FUNDAMENTAL THAT THE DUE PROCESS CLAUSE MUST PROTECT IT AGAINST STATE DENIAL. THIS IS SO BECAUSE THE PROTECTION AGAINST STATE DENIAL WHICH HAS BEEN GIVEN TO THE FIRST AMENDMENT FREEDOMS BY THEIR INCLUSION WITHIN THE DUE PROCESS CLAUSE IS INCOMPLETE, AND MAY BE INEFFECTIVE, UNLESS THE RIGHTS OF AN ACCUSED (INCLUDING THE RIGHT TO THE APPOINTMENT OF COUNSEL) ARE ALSO PROTECTED AGAINST STATE DENIAL.

In *Powell* v. *Alabama* the Court relied (at 67) for its holding in part upon the authority of the decisions which had, a comparatively short time before, brought freedom of speech and of the press within the protection of the due process clause. There were at that time only three such decisions.

Since 1932, when *Powell* v. *Alabama* was decided, the Court has settled, in a series of uncompromising opinions, that freedom of speech and of the press are protected against invasion by the States, through the due process clause. It has also, in 1937, brought within that protection the right peaceably to assemble, also guaranteed by the First Amendment (*De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242), and, in 1940, the free exercise of religion (*Cantwell* v. *Connecticut*, 310 U. S. 296). But the rights guaranteed to the accused by the Fifth, Sixth and Eighth Amendments have a double purpose: They were intended not merely to protect the perpetual minority of persons accused of crime, but were designed also to insure that the First Amendment's guaranties of freedom of speech and of the press, of freedom of assembly and of religious freedom, should be guaranties in fact, not guaranties only in form. For the framers of the Bill of Rights were well aware that the most common and most effective

mechanism for deprivation of the First Amendment freedoms was a criminal prosecution. History proved that then, and it has remained true to this date, as this Court's recent decisions dealing with these freedoms make evident. The vast majority of these were criminal prosecutions.

In *Chambers* v. *Florida*, 309 U. S. 227, 235-237 (1940), the Court said:

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scape goats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny * * * But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

As was said by Mr. Justice Black in *Feldman* v. *United States*, 321 U. S. —, 64 S. Ct. 1082 (1944):

> "The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.
>
> "But these men were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment also insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. They sought by these provisions to assure that no individual could be punished except according to 'due process,' by which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights. If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished."

The rights of the accused in criminal prosecutions thus bear an intimate relation to the maintenance of freedom

of speech and of the press, the free exercise of religion and the right of assembly. While in a particular case the relation may not exist, the rights of the accused must still be protected because of the cases in which the relation may exist.

It is therefore urged that, the Court now having established that the First Amendment freedoms are protected against State denial, it is necessary, in order to make their protection not subject to impairment, to afford an equally effective protection against State denial for the fundamental rights of the accused in a criminal prosecution. The right to the appointment of counsel for an indigent defendant is not merely one of these; it is the key to all the others. It is often infinitely more valuable to an accused unable to employ counsel, in danger of losing his life or liberty, than any other freedom or right guaranteed by the Bill of Rights. The due process clause must protect it.

5. THE RULE ANNOUNCED IN BETTS V. BRADY IS NOT AN ADEQUATE ALTERNATIVE TO APPLYING THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT THE RIGHT TO APPOINTMENT OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT.

In *Betts* v. *Brady* the Court held that, while the failure to appoint counsel in a particular case might result in a conviction lacking in fundamental fairness, the right to appointment existed only in cases where it could be established that such appointment was necessary in order that the accused might have a fair trial.

The rule, of which this seems to be an application, that the due process clause requires a trial which is substantially fair, was first applied to criminal cases in which the trial, though superficially conforming to due process, was simply a mask for a conviction due to mob influence, to public passion, or to perjured testimony. See: Mr. Justice

Holmes' dissenting opinion in *Frank* v. *Mangum*, 237 U. S. 309, 340, 345 (1915); *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Mooney* v. *Holohan*, 294 U. S. 103 (1935). It was thus used to add something to the Bill of Rights, not as a condition for the operation of any right of the accused. In *Betts* v. *Brady* the rule was, apparently for the first time, used as a condition precedent for a specific procedural requirement.

It is submitted that the rule cannot be an adequate alternative to applying the specific guaranty of the right to appointment of counsel. The appointment must be made by the trial court, if it is to be effective, at the very outset of the trial, before the accused pleads to the charge. At that stage, all that the trial court usually knows is (1) the nature of the charge and (2) the accused's appearance and manner. It cannot know, at that time, what the testimony will disclose, nor what the accused's defenses on the evidence and on the law may be. It often can have at that time only the slightest knowledge of the extent of the accused's education, or of his familiarity or lack of it, with court procedure. But all of these are essential elements in the determination of whether or not the accused needs counsel in order to make his defense adequately, and thus to have a fair trial. The Court so indicated in *Betts* v. *Brady*.

Even in an appellate court, after a trial has been had, there is room for difference of opinion in determining whether or not the accused needed counsel in order to have a fair trial. But it is suggested that it is most difficult, if not, indeed, impossible, for a trial court to make an intelligent determination that an accused does not need counsel in order to present his defense adequately, at a time when the accused has not even pleaded. The rule laid down in *Betts* v. *Brady* seems therefore one which in practice presents great difficulties of application.

What is equally important is that the decision has deprived all persons accused of crime of any definite constitutional assurance with respect to their right to have counsel appointed. When an accused inquires with respect to appointment of counsel, he may be told by the jailer or sheriff or prosecutor that this Court has held that he is not entitled to counsel unless a fair trial cannot otherwise be had, and that of course he will receive a fair trial. And trial courts may sometimes have excessive confidence in their ability to insure a fair trial.

It was said in the dissenting opinion in *Betts* v. *Brady* (at 475) that "the prevailing view of due process, as reflected in the opinion just pronounced * * * gives this Court such vast supervisory powers that the dissenting justices were "not prepared to accept it without grave doubts." The Court will be able to appraise the extent of the burden placed upon it by the rule which *Betts* v. *Brady* announced. The burden would be much reduced by the application of the specific right to counsel as guaranteed by the Sixth Amendment. In addition, it is suggested that the application of *Betts* v. *Brady* is both unaided and unrestrained by any specific rule.

It is submitted that the right to the appointment of counsel, as guaranteed by the Sixth Amendment, is guaranteed against State abridgment by the due process clause of the Fourteenth Amendment, and that *Betts* v. *Brady* should be overruled.

Respectfully submitted,

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